

## **PROPOSED MISSOURI MEDIATION ACT**

### Need for Act

Mediation is becoming commonplace in business, community, consumer, employment, and family disputes. More contracts are including mediation clauses. Missouri does not have a general use statute that defines mediation or best practices in mediation. Mediation is most effective when a mediator is impartial and assists the participants to reach a mutual agreement based on their own decision. Such agreements are satisfying and promote compliance.

The absence of standards is not serving the interests of citizens of this state. Currently anyone can hold themselves out as a mediator and offer any disputes resolution process as mediation. The process may be coercive. There is no restraint on a “mediator” having interests tied to a participant in the dispute.

The references to mediation that exist in state law at present are few. Section 435.014 of the Missouri Uniform Arbitration Act provides that mediators shall not be “subpoenaed or otherwise compelled to disclose any matter disclosed in the process of setting up or conducting ... mediation.” R.S.MO 436.362 sets out the standards for mediation of home construction defect disputes. The adoption of this legislation in 2005 is a good example of the benefits that are derived by having a general use Mediation Act. The bill as initially proposed did not incorporate mediation standards considered fair and effective in the industry. Eventually, through the efforts of many, those practices were incorporated in the final bill. The standards, however, are limited to this one type of dispute. With the adoption of a general use Mediation Act, reference could be made to the Act in future legislation, avoiding the need to recreate standards with the introduction of each new bill.

### Purpose of Act

The proposed Act would adopt standards for mediation established by the Missouri Supreme Court that have been in use in court connected mediation since 1996. These standards are widely following in other mediation settings around this state. The proposed Act enacts these standards for mediation authorized by state statute, administrative agency programs, and mediation clauses in contracts entered in this state.

### Fiscal Impact

There is no direct fiscal impact to this proposal. Use of mediation and establishment of mediation programs by state agencies is discretionary. This proposal establishes only the standards for those who wish to implement a mediation program.

**AN ACT to amend chapter \_\_\_\_, Revised Statutes of Missouri, by adding thereto \_\_ new sections relating to resolution of disputes through the use of mediation.**

**Be it enacted by the General Assembly of the State of Missouri, as follows:**

\_\_\_\_.100 Mediation defined.

Mediation is a process in which a neutral third party, called a mediator, facilitates communication between the participants to promote resolution of their dispute. A mediator may not impose his or her own judgment on the issues for that of the participants. Mediation shall be non-binding. A written agreement on terms resolving the dispute setting out the essential terms of the agreement, executed by the participant after termination of the mediation process, shall be binding to the extent not prohibited by law.

\_\_\_\_.101 Application of this Act.

All mediation conducted in disputes for which mediation is authorized by statute, by administrative agency or authority or its regulations, or by contract entered in this state shall be governed by this Act. It is the policy of this state to encourage the development of mediation and other alternative dispute resolution programs that will meet the needs of the citizens of the state of Missouri.

\_\_\_\_.102 Selection of Mediator

(a) Participants may select a mediator acceptable to all participants to conduct mediation, or may apply to a court of appropriate jurisdiction for appointment of a qualified mediator in the event the participants cannot agree upon the selection. Nothing herein shall prohibit the participants from agreeing to the selection of a different mediator than the one selected by the court.

(b) In appointing a mediator, the court shall consider the nature and extent of any relationship the mediator may have with the participants and any personal, financial, or other interests the mediator may have that could result in bias or conflict of interest.

(c) Each state agency or authority establishing a mediation program shall adopt rules assuring self-determination of the participants, disclosure of mediator conflicts of interest ~~the impartiality of the mediator~~, allowing for the removal or withdrawal of the mediator, and ~~providing for~~ the method of compensation of the mediator.

\_\_\_\_.103 Qualifications of Mediators

(a) Any individual providing mediation pursuant to this Act shall disclose any previous or current personal or financial relationships to any participant and shall withdraw as mediator in the event of partiality toward ~~conflict of interest with~~ any participant that is not waived by the participants.

(b) The mediator may act as a mediator in subsequent mediations between the participants. The mediator, however, shall decline to act on behalf of any participant by providing subsequent representation, counseling, or treatment unless the matter is clearly distinct from the issues raised in mediation.

\_\_\_\_.104 Duties of the Mediator.

(a) The mediator selected shall provide notice to all participants to the mediation of the date, time and place of mediation.

(b) The mediator shall inform the participants in writing of the costs of mediation and disclose any current, past or anticipated relationship between the mediator and any participant, attorney for any participant, or the subject matter of the mediation that compromises or appears to compromise the mediator's impartiality. A mediator shall also disclose any potential grounds of bias or conflict of interest that could cause a mediator's impartiality to be reasonably questioned. After appropriate disclosure, the mediator may continue to serve as mediator if all participants agree unless the conflict of interest clearly impairs the mediator's ability to be impartial regarding the outcome of the mediation.

(c) The mediator shall describe the role of the mediator including that the mediator is impartial, that the mediator has no decision-making authority regarding the outcome of the mediation, and that any participant may terminate participation in mediation at any time.

(d) The mediator shall assist the parties in identifying the issues, reducing misunderstandings, clarifying priorities, exploring areas of common interest, options, and points of agreement. The mediator shall not give legal advice to any participant.

(e) The mediator may terminate mediation whenever the mediator believes that mediation is inappropriate because any participant lacks the ability or willingness to participate meaningfully in mediation or any participant is intimidated in a way that inhibits voluntary decision-making of the participant.

(f) The mediator may, at the request of the participants, make a written summary of any understanding reached by the parties. A copy of the summary shall be provided to the participants and their attorneys, if any. Any understanding reached by the participants as a result of mediation shall not be binding upon a participant until it is signed by the participant.

\_\_\_\_.200 Confidentiality of Mediation.

(a) Mediation proceedings shall be regarded as settlement negotiations. Offers to compromise or settle any issue that is the subject of the mediation and any other

communications relating to the subject matter of a dispute made during the mediation process by a participant or any other person present during the mediation shall be a confidential communication.

(b) No admission, representation, statement or other confidential communication made in setting up or conducting mediation shall be admissible as evidence in court or subject to discovery, except that no fact independently discoverable shall be immune from disclosure as a confidential communication.

(c) No individual or organization providing alternative dispute resolution services pursuant to this Act, and no agent or employee of the individual or organization, shall be subpoenaed or otherwise compelled to disclose any matter disclosed in the process of setting up or conducting mediation.

(d) Nothing herein shall prohibit a mediator who is a mandated reporter pursuant to state law to report child or elder abuse.

(e) "Settlement shall be by a written document setting out the essential terms of the agreement executed after the termination of the alternative dispute resolution process."

(f) An individual or organization providing alternative dispute resolution services pursuant to this Act, and any agent or employee of the individual or organization, may be called in an action to enforce a written settlement agreement signed by the participants following the conclusion of the mediation for the limited purpose of describing events after conclusion of the mediation process.